Service Date: July 11, 1996

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * * *

IN THE MATTER of the Complaint	)	UTILITY DIVISION
of Ross Creek Hydro, LLC v. The	)	DOCKET NO. D96.2.26
Montana Power Company.	)	ORDER NO. 5926

FINAL ORDER

Appearances

FOR THE COMPLAINANT/PETITIONER:

Matthew W. Williams, Attorney at Law, Williams, Jent & Dockins, 506 E. Babcock, Bozeman, Montana 59715

FOR THE RESPONDENT:

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COMMISSION STAFF:

Robin A. McHugh, Attorney
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BEFORE:

DAVE FISHER, Vice Chairman
BOB ANDERSON, Commissioner
BOB ROWE, Commissioner

I. Introduction and Background

1. On February 23 1996 Ross Creek Hydro, LLC (Ross Creek) filed a complaint against the Montana Power Company (MPC) pursuant to § 69-3-603, MCA. The reason for the complaint is a dispute between Ross Creek and MPC over certain provisions in an unexecuted power purchase agreement. Ross Creek is a qualifying facility (QF) pursuant to § 69-3-601(3), MCA and Section 210 of the Public Utilities Regulatory Policies Act (PURPA), 16 USC § 824a-3. MPC is a public utility pursuant to § 69-3-601(4), MCA. The Montana Public Service Commission (Commission) issued a Notice of Complaint and MPC filed an answer. After proper notice a hearing was held on the complaint on May 30, 1996. At the hearing Ross Creek presented the testimony of Brent Smith and introduced the following exhibits: Amended and Restated Power Purchase Agreement Between Buffalo Hydro, Inc. and PacifiCorp (Ross Creek No. 1); U.S. Geologic Survey data on water conditions in various drainages (Ross Creek No. 2); Power Purchase Agreement Between Ross Creek Hydro, L.C. and MPC (Ross Creek No. 3). MPC presented the testimony of Robert Stuart and John Leland and introduced the following exhibits: February 13, 1995 letter to MPC from Brent Smith (MPC A); graph drawn at the hearing by MPC witness John Leland (MPC B); MPC written answers to Commission data requests (MPC C); QF contract information and monthly QF capacity and energy data (late filed MPC D). All exhibits have been admitted. Both Ross Creek and MPC submitted prehearing memoranda and post-hearing briefs. In addition, Ross Creek submitted Proposed Findings of Fact and Conclusions of law.

2. Pursuant to federal and state law, with certain exceptions not relevant here, a public utility must purchase electricity (capacity and energy) from QFs at rates that are established either by a standard (default) tariff or by negotiation between the utility and the QF. Ross Creek and MPC have attempted to negotiate a power purchase agreement (Agreement) using the rates established at Commission default tariff LTQF-1. It is uncontested that Ross Creek, a small hydro facility with installed capacity of 450 kw, qualifies for the LTQF-1 tariff. Ross Creek and MPC have been unable to execute the Agreement because of Ross Creek's objection to sections 1.13 and 3.6.

3. Section 1.13 of the Agreement reads: "Firm Energy: Beginning with the execution of this Agreement, Firm Energy is defined as 2,759,400 kwh per Contract Year. This amount is

subject to reductions pursuant to Subsection 3.6. The Firm Energy shall never be increased." Section 3.6 of the Agreement reads:

> At the end of each Contract Year, the actual Energy produced during such Contract Year will be compared to the Firm Energy amount specified in Subsection 3.2.3. If the actual Energy is less than the specified Firm Energy, this Agreement shall be deemed to have been amended to reflect a new Firm Energy amount equal to the actual Energy produced during the preceding Contract Year.

These two sections, along with Appendix A to the Agreement, specify separate rates for firm and non-firm energy. Firm energy is defined as a given maximum annual amount at the execution of the Agreement. Section 1.13. This amount can never be increased under the Agreement but can be decreased depending on the performance of the facility. Energy produced in excess of the specified firm energy amount is considered non-firm energy and purchased at a separate rate. Section 3.6 and Appendix A, Section 3.1.2.

4. Ross Creek complains that sections 1.13 and 3.6, and separate rates for firm and non-firm energy under Appendix A violate default tariff LTQF-1, are contrary to the intent of PURPA and impose an intolerable risk on QFs. MPC responds that experience shows QF facilities are unreliable and it should only have to pay a firm energy rate for energy that is truly firm.

Discussion

5. The Commission finds that a resolution of this dispute turns on an interpretation of the LTQF-1 tariff. It is not contested that Ross Creek is entitled to elect to sell power to MPC under the rates and conditions specified in LTQF-1. The question, therefore, is whether LTQF-1 specifically allows, or may reasonably be construed to allow, the inclusion of the disputed sections in a QF/utility power purchase agreement.

6. The LTQF-1 tariff establishes a menu of energy rates from which a seller may choose; it does not distinguish between firm energy and non-firm energy, nor does it establish separate rates for firm and non-firm energy. The inclusion of sections 1.13 and 3.6 in the disputed Agreement cannot be supported by specific reference to the LTQF-1 tariff. MPC concedes this point. Therefore, if support for the disputed sections is to be found in LTQF-1, it must be because

"energy" as used in that tariff must, based on relevant state and federal sources, be read most reasonably as "firm energy."

7. The Commission notes first that there is a heavy presumption in favor of a plain reading of a tariff, just as there is of a contract, rule or statute. It is possible, however, that documents extraneous to a tariff could make it evident that language in a tariff has an intended meaning different from the plain meaning.

8. Relevant background documents to the LTQF-1 tariff include PURPA, FERC rules, Sections 69-3-601 - 604, MCA, ARM 38.5.1901 - 1908 (Commission rules), and Commission Order Nos. 4865 (Docket No. 81.2.15), 5017 (Docket No. 83.1.2) and 5091c (Docket No. 84.10.64). The Commission's review of these documents reveals little, if any basis for interpreting "energy" as "firm energy" in the LTQF-1 tariff. MPC refers to a glossary in Order No. 5017 that includes a definition for "firm energy," and argues that language at § 69-3-604(3), MCA (rates paid for QF power, "shall be established with consideration of the availability and reliability of the electricity produced.") supports its position that there be separate rates for firm and non-firm energy. The Commission finds, however, that inclusion of the term "firm energy" in the glossary says nothing relevant to the resolution of this dispute. For purposes of this dispute the relevant part of Order No. 5017 is the Commission's response to Montana-Dakota Utilities' argument that default rates should distinguish between firm and non-firm power: "The Commission rejects use of distinctions based on QF size or firmness of power." Order No. 5017, p. 10. With respect to the statutory language cited by MPC, the Commission acknowledges that that language can reasonably be read as legislative support for MPC's argument. There may, however, be other ways of responding to the language without creating a firm/non-firm energy distinction in the default rates. The language existed prior to the issuance of the three Commission general policy orders on the establishment of avoided cost rates (Order Nos. 4865, 5017 and 5091c) and it is not recorded in those orders that MPC or any other party argued that the language at § 69-3-604(3), MCA, required the Commission to reach a particular conclusion about firm/non-firm energy.

9. In summary, the Commission finds that there is no documentary basis to conclude that "energy" as used in the LTQF-1 tariff must be read as "firm energy." That being the case, Ross

Creek is entitled to the LTQF-1 rate for all energy produced by the facility, and MPC is directed to modify the Agreement it offered Ross Creek accordingly.

10. There is good discussion on this record of the merits of making a distinction between firm and nonfirm energy in the LTQF-1 tariff. It is not necessary, however, for the Commission to comment on that discussion. If MPC thinks the LTQF-1 tariff should be changed it can file with the Commission and argue its case. The QF industry and other interested persons would have the opportunity to respond. That would be the appropriate proceeding to consider a change to the tariff.

CONCLUSIONS OF LAW

1. The Public Service Commission has jurisdiction over this dispute pursuant to § 69-3-603, MCA.

2. Montana Power Company's LTQF-1 tariff does not distinguish between firm energy and non-firm energy.

3. Ross Creek Hydro is entitled to sell electric power to MPC under the terms and conditions of the LTQF-1 tariff.

ORDER

Montana Power Company is directed to offer a power purchase agreement to Ross Creek Hydro that conforms with this order.

Done and dated this 8th day of July, 1996 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Vice Chair

BOB ANDERSON, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.